IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. A-473 **76-1059**

LEON ROBERT ELKINS,

Petitioner,

v.

OHIO

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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Petitioner, Leon Robert Elkins, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio, entered in the above entitled case on September 10, 1976.

OPINIONS BELOW

The Ohio Supreme Court overruled Petitioner's motion for leave to appeal from the Court of Appeals for Franklin County and dismissed the appeal of the Petitioner sua sponte on September 10, 1976, reported at 47 Ohio Bar 1219 (1976). The Opinion of the Court of Appeals for Franklin County is reported at 47 Ohio App. 2d 307 (1976), a copy of which is appended hereto.

The underlying conviction in the Franklin County Court of Common Pleas was entered, after a finding of guilt, rendered without written opinion. Such finding was in response to the Petitioner's plea of no contest following the denial without written opinion of Petitioner's Motion to Suppress Evidence.

JURISDICTION

On the 27th of May, 1975, Petitioner was convicted in the Franklin County Court of Common Pleas for (1) Possessing for Sale an Hallucinogen (Marijuana) and (2) Keeping a House for the Illegal Keeping or Dispensing of an Hallucinogen (Marijuana). The sentence imposed for the first conviction was ten to twenty (10 - 20) years and two to fifteen (2 - 15) years to be served concurrently on the second charge. The sentence has been stayed pending the final disposition of this litigation. No motion for rehearing was filed.

Having exhausted his state remedies, Petitioner now submits this, his petition for a writ of certiorari.

On the 9th day of December, 1976, Mr. Justice Stewart, as Circuit Justice, granted an extension of time within which to file a petition for a writ of certiorari, up to and including February 7, 1977.

This Court's jurisdiction is invoked pursuant to 28 United States Code §1257 (3), as this action, cites error in the ruling of the state court in failing to suppress evidence which was obtained by state and federal police agents in violation of the Fourth and Fourteenth Amendments to the United States Constitution.

QUESTIONS PRESENTED FOR REVIEW

I. WHEN POLICE OFFICERS USE A CANINE'S OLFACTORY CAPABILITY TO PERMEATE THE EXTERIOR OF A SEALED FOOT LOCKER IN TRANSIT ON A COMMON CARRIER, WHERE THERE EXISTED AN EXPECTATION OF PRIVACY, SOLELY ON THE TIP OF AN INFORMANT OF UNPROVEN RELIABILITY, SUCH ACTIONS CONSTITUTE AN UNREASONABLE SEARCH WITHIN THE MEANING OF THE FOURTH AMENDMENT. ANY SEARCH WARRANTS OBTAINED AS THE RESULT OF SUCH SEARCH ARE TAINTED AND EVIDENCE OBTAINED MUST BE SUPPRESSED.

II. ASSUMING WITHOUT CONCEDING THAT THE PENETRATION OF THE EXTERIOR OF A SEALED FOOT LOCKER, WHERE THERE WAS AN EXPECTATION OF PRIVACY, BY A CANINE'S OLFACTORY SENSES DOES NOT CONSTITUTE A SEARCH, THERE WAS AN INSUFFICIENT SHOWING OF THOSE ELEMENTS OF THE CANINE'S RELIABILITY AND TRUSTWORTHINESS NECESSARY TO ALLOW A NEUTRAL AND DETACHED MAGISTRATE TO DETERMINE WHETHER PROBABLE CAUSE TO ISSUE A WARRANT TO SEARCH THE BOX DID EXIST. ABSENT SUCH PROBABLE CAUSE, ANY WARRANTS ISSUED IN RELIANCE THEREON OR

EVIDENCE OBTAINED FROM SUBSEQUENT SEARCHES MUST BE SUPPRESSED.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1) Amendment Four, United States Constitution

(2) Amendment Fourteen, United States Constitution

(3) Rule 41 (C), Ohio Rules of Criminal Procedure

STATEMENT OF THE CASE AND FACTS

The above questions present important constitutional issues of broad significance, which have not heretofore been determined by this Court. In essence, this case deals with the rather recent use by police agencies of canines, in particular, and other aids, in general, to the human senses to surveil persons, places and things without warrants to determine the existence of contraband. It involves the question of the protection of rights secured by the Fourth Amendment to the United States Constitution and the extent to which police agencies may employ such devices without the safeguard of a warrant to effectively search the contents of sealed containers placed in transit by unsuspecting individuals. This case is of heightened importance because of the increasing capability of our expanding technology to surveil and intrude into zones of expected privacy without physical trespass.

In Katz v. United States, 389 U.S. 347 (1967), this Court established the "reasonable expectation of privacy" test to determine whether a particular search or intrusion fell within the protections of the Fourth Amendment. This Court did not limit the expectations of privacy to that which the individual would have in his home, but also to his "person, . . . papers and effects." We believe this applies equally to one's use of telephones, the mails or common carriers for the transportation of personal effects.

In a case almost identical to the case before this Court, United States v. Solis, 393 F. Supp. 325 (C.D. Cal. 1975), the District Court held that the use of two trained dogs that had been employed to smell the molecular diffusion emanating from marijuana located within a sealed trailer was a search, lacking probable cause. The Court stressed the analogy between that situation and the "reasonable and justifiable expectation of privacy" expressed in Katz; the use of the dogs amounted to an intrusion by an "uninvited canine nose." Id., at 327.

> "In the absence of a warrant supported by probable cause, or certain recognized exceptions for a warrantless search, people living in a free society should not, for example, be required to tolerate intrusions into their privacy by the Government's use of electronic monitoring equipment, high power telescopes, or the keen olfactory powers of specially trained dogs. These and other extraordinary information gathering devices gravely threaten each person's ability to maintain any semblance of privacy." Id., at 328.

Notwithstanding the reasoned view of the District Court, the Ninth Circuit Court of Appeals reversed, finding that no search was involved and that the use of the canine was reasonable and an inoffensive intrusion. United States v. Solis, supra, rev'd. 536 F. 2d 880 (9th Cir. 1976).

Recently, two Circuit Courts have also held that no searches occurred when dogs were utilized to detect the presence of contraband within sealed containers. United States v. Bronstein,521 F. 2d 459 (2nd Cir. 1975); United States v. Fulero, 498 F. 2d 748 (D.C. Cir. 1974).1/

The second issue is one of facial adequacy of the search warrant. The clear failure of the Ohio Courts to apply the constitutionally based requirements underlying the issuance of search warrants as articulated in Aguilar v. Texas, 378 U.S. 108 (1964);

1/ A number of lower Federal Courts have struggled to apply the Katz rationale to sense enhancing and sense replacing devices ranging from scintillators, Corngold v. United States, 367 F. 2d 1 (9th Cir. 1966), a pre-Katz case, to magnometers, United States v. Albarado, 495 F. 2d 799 (4th Cir. 1974); United States v. Shipwith, 482 F. 2d 1272 (5th Cir. 1973); U.S. v. Bell, 464 F. 2d 667 (2nd Cir. 1972). cert. denied, 409 U.S. 991 (1972),and detection dogs, United States v. Ponder, 45 C.M.R. 428 (1972) petition for review USCMA denied 45 C.M.R. 928 (1972).

Spinelli v. United States, 393 U.S. 410 (1969); and United States v. Harris, 403 U.S. 573 (1971), justifies the exercise of jurisdiction by this Court. The substitution of a dog for the traditional informant does not obviate the burden imposed upon a magistrate to independently determine the credibility and reliability of the canine as a source in the finding of probable cause. Even assuming that the Court is willing to sanction the use of canines as an adjunct to law enforcement activities, it is of utmost importanct to place before the magistrate the underlying reasons for the affiant's reliance upon the canine's verifications, that is, the canine's training, experience, and trustworthiness, prior to the issuance of the search warrant.

The Katz holding sought to establish the outer bounds of unwarranted intrusions upon the privacy of the individual. In so doing it recognized with substantial prescience the mushrooming development and diffusion of extra-sensory implements capable of piercing an individual's expected "zone of privacy." The Katz court set the outer limits at human sensing faculties. When equipment, electronic or canine, is employed as an adjunct, then it is mandatory to first obtain the authorization of a search warrant.

> "Otherwise, as the majority recognizes, the spectre of a 'Big Brother' baggage search, uncurbed by the Fourth Amendment, would then loom much larger on the horizon. As more sophisticated detection devices are developed in the future, such a broad authority would be an open invitation to conduct blanket examinations, thus eroding the principles underlying the Fourth Amendment itself." U.S. v. Bronstein, supra, at 465. (Concurring opinion of Mansfield, J.)

On January 25, 1975, Judge Frank Reda, of the Franklin County Municipal Court, issued a warrant to search a sealed foot locker which was located at the Port Columbus International Airport. The facts which Judge Reda was presented with were those contained in the affidavit for the search warrant, which is set out below:

> "The facts upon which such belief is based are as follows: on 1/25/75 Det. Nash received the following information from Special Agent Charlie Banks, a Group Leader in Cleveland, Ohio D.E.A. Office and Will Rutledge, a Special Agent for the D.E.A. Det. Nash has personally worked with the above-named persons and knows them to be reliable sources of information, who have given factual information in the past. Agent Charlie Banks stated the D.E.A. Office has received an anonymous phone call, and the caller stated that a parcel had been sent from San Diego, California to Ceramics and Other Nice Stuff, 1822 East Main St., Columbus, Ohio. The caller also stated that the package contained marijuana. The

sender of the package is alleged to be Leon Elkins of 5759 Churchill Rd., San Diego, California. The package was sent to Cleveland, Ohio via American Airlines, parcel delivery, bearing Shipping Bill No. 001SAN07645411, and measuring approximately 21 inches by 24 inches by 46 inches. Upon the plane's arrival in Cleveland, Ohio, Agent Will Rutledge met the plane and verified the fact that the package was aboard the plane. Agent Rutledge affirmed the arrival and called Customs Agent Dwight Dyche, (see Attachment No. 1) . . . ."

(Attachment No. 1)

"The facts upon which such belief is based are as follows: an agent for the U.S. Customs Department, and a dog handler, who used his dog, which has been used on several occasions to seek out marijuana, to verify the parcel contained marijuana. The dog indicated that marijuana was in the parcel. The above information was then relayed by telephone to Det. Nash by Will Rutledge. Custody of the parcel was maintained by the Cleveland, Ohio D.E.A. Office until it was placed in a Quick Airfreight No. 8839, and shipped to Columbus, Ohio, American Airfreight Terminal where it was met by Det. Nash, Woodard, Wasem and

Webb. The package is a U-Haul Clothes Box, weighing 66 lbs. and is supposed to be filled with novelties. Leon Elkins is known to the Columbus, Ohio Police Department as a trafficker in drugs, and has been arrested by the Columbus Police Department, disposition unknown at this time."

Solely in reliance upon the above statement, Judge Reda issued a warrant to search the foot locker which was then located at Port Columbus International Airport. The warrant was executed and two days later the box was opened. Twenty-one kilos of plant material were discovered, nineteen of these were removed and replaced with items approximating the same weight. The package was then resealed and forwarded for delivery to the addressee.

The delivery to the original consignee was made on January 27, 1975. Subsequently, a second warrant was obtained from Judge Fred Donnally of the Franklin County Municipal Court for the search of the premises known as Ceramics and Other Nice Stuff, 1822 East Main Street, Columbus, Ohio. The affidavit for this second search was based on information gained through the search of the package at the airport, as well as in reliance upon the initial warrant which had previously been issued by Judge Reda. Pursuant to this second warrant, a search of the premises was conducted, which resulted in the arrest of Petitioner and the seizure of the remaining two kilos of marijuana, along with other items, including airline tickets and miscellaneous papers. It was this evidence and previously seized evidence

which Petitioner sought to suppress by motion to the trial court. He entered no contest pleas which resulted in the finding of guilt by the trial court. It is from the failure on the part of the trial court to suppress this evidence that Petitioner by assignment of error appealed to the Court of Appeals for Franklin County. That Court affirmed the decision of the trial court. The Ohio Supreme Court overruled the Motion for Leave to Appeal from the Court of Appeals and dismissed the appeal sua sponte. Petitioner now seeks this writ.

REASONS FOR GRANTING THE WRIT

I.

WHEN POLICE OFFICERS USE A CANINE'S OLFACTORY CAPABILITY TO PERMEATE THE EXTERIOR OF A SEALED FOOT LOCKER IN TRANSIT ON A COMMON CARRIER, WHERE THERE EXISTED AN EXPECTATION OF PRIVACY, SOLELY ON THE TIP OF AN INFORMANT OF UNPROVEN RELIABILITY, SUCH ACTIONS CONSTITUTE AN UNREASONABLE SEARCH WITHIN THE MEANING OF THE FOURTH AMENDMENT. ANY SEARCH WARRANTS OBTAINED AS THE RESULT OF SUCH SEARCH ARE TAINTED AND EVIDENCE OBTAINED MUST BE SUPPRESSED.

Question I presents three significant branches for this Court's consideration. (A) Was the footlocker constitutionally protected from unreasonable search by the Fourth Amendment? (B) Did the use of a dog to permeate the box to detect contraband constitute a search within the meaning of the Fourthe Amendment? (C) If the foot locker was protected by the Fourth Amendment and if the use of the dog did constitute a search, was the search reasonable?

A. Was The Foot Locker Constitutionally Protected From Unreasonable Searches By The Fourth Amendment?

Until December 18, 1967, this Court has taken the position that in order for the protections of the Fourth Amendment to become operative, a physical intrusion of an enclosure must occur, Olmstead v.

United States, 277 U.S. 438 and Goldman v. United States, 316 U.S. 129; however, on that date this Court decided Katz v. United States, 389 U.S. 347 (1967). In Katz, this Court held:

> "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection (citations omitted). But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." Katz, supra, at 351. (Emphasis added.)

This principle has had far-reaching effects on decisions throughout the country, for although some courts are recognizing that the individual expectation of people is what counts [see Corngold v. United States, 367 F. 2d 1 (9th Cir. 1966)] most courts were stuck on the so-called "trespass doctrine" of Olmstead and Goldman. After Katz, the development of the law in this area has been markedly different.

Katz involved the use of an electronic listening device attached to the outside of a telephone booth through which federal agents recorded Katz' conversations relating to gambling. The Court found from the circumstances that Katz expected his conversations to be private and that the Fourth Amendment protected him from violations of his privacy by unreasonable searches. In following Katz, courts in other jurisdictions have applied this principle. In U.S. v. Durkin, 335 F. Supp. 992 (1971), the Circuit Court found that a rented locker at a public terminal was protected because, the defendant

> ". . . justifiably expects that it is for his private use, to place therein what he will, free from prying eyes, and that it and its contents are inviolate except as they may be constitutionally searched," Durkin, at p. 996.

In a case directly applicable to the facts of the instant case, the California Supreme Court, in ruling on the search of a locked foot locker which had been given over to an airline for shipment, said that the defendant did not waive his Fourth Amendment right to be free from unreasonable searches simply because the airline employees could have looked in his locker. The Court's specific language is as follows: "McGrew might have expected that an airline employee would inspect baggage where danger or inconsistency was observed, but he could not reasonably be expected to anticipate police searches for contraband." People v. McGrew, 462 P. 2d 1 (1969) at p. 6.

In U.S. v. Solis, supra, overruled on appeal by the Ninth Circuit Court of Appeals, 536 F. 2d 880 (1976), the District Court found that a semi-trailer parked on a Shell service station lot which was closed and locked but unattended was covered by the expectation of privacy as enunciated in Katz.

The Petitioner herein shipped a package from California to Columbus via American Airlines. The foot locker was closed and sealed and the Petitioner's name was listed in the space reserved for a return address. Certainly the Petitioner had the expectation that the privacy of the foot locker would be inviolate. The thrust of the Katz decision and those decisions which have followed require that absent exigent circumstances

a dog can only be used where probable cause exists and a warrant has been obtained.

B. Did The Use Of A Dog To Permeate The Foot Locker To Detect Contraband Constitute A Search Within The Meaning Of The Fourth Amendment?

In approaching the second question presented herein, it is necessary to turn again to Katz v. U.S., supra. In addition to elucidating the concept of the expectation of privacy, this Court announced a corollary but still a very significant principle when it said, "the reach of the Fourth Amendment cannot turn on the presence or absence of a physical intrusion into any given enclosure," Katz, supra, at 353. The changing nature of this principle is demonstrated by the reasoning in Corngold v. United States, supra, in which the Ninth Circuit found that even though Corngold was protected by the Fourth Amendment from a search by police officers of a package which he had entrusted to TWA Airlines, he was not protected from the use of a "scintillator" to penetrate the walls of his apartment to detect radium on watch dials. Corngold was decided in 1966, one year before Katz, when the "trespass doctrine" was still the law of the land. If Corngold had been decided after Katz, the decision on the scintillator issue would, in all probability, have been opposite.

In considering the use of dogs to sniff packages, the federal courts have considered the precedent established in Katz but the decisions vary according to the facts of the individual cases. The key question facing the court is: Are the keen olfactory powers

of specially trained dogs equivalent to electronic monitoring equipment?2/

Logically, it certainly seems to follow that if government agents are prevented from using electronic devices from hearing what they would otherwise not be able to hear or scintillators or magnetometers to "see" what they would not otherwise be able

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2/ One area where Courts have grappled with the issue of the utilization of detection dogs is in the United States Military Courts. While these courts have not clearly decided the issue, there is a difference of opinion among military writers about whether the use of a detection dog is a search. "Whether the very use of the dog constitutes a search . . . should be the initial consideration." Kingham, Marijuana Detection Dogs As An Instrument of Search: The Real Question, THE ARMY LAWYER, D.A. Pam 27-50-5, 10 (May, 1973). "The use of the dog is analogous to the employment of mechanical devices such as magnometers and electronic bugging devices. Probable cause must antedate the use of the marijuana detection dogs." Kingham, supra, at 11-12.

Opposing writers maintain that using a dog to supply probable cause for a search is not a search per se. Lederer and Lederer, Admissibility of Evidence Found by Marijuana Detection Dogs, THE ARMY LAWYER, D.A. Pam 27-50-4, 12, 13 (April, 1973). But see, a more recent publication where the authors conclude in view of the comparability between the use of dogs and the use of magnetometers in airport searches for weapons it would be disingeneous to argue that the use of dogs is anything but a search. Lederer and Lederer, Marijuana Dog Searches After United States v. Unrue, THE ARMY LAWYER, D.A. Pam 27-50-12, 6, 7 (Dec. 1973).

to see, then the government should be prevented from using specially trained dogs to smell that which they would not otherwise be able to smell. All are sophisticated means beyond human ability and not just enhancement of human senses. See U.S. v. Minton, 448 F. 2d 37 (4th Cir. 1973); Cobb v. Wyrick, 379 F. Supp. 1287 (W.D. Missouri 1974).

In a case more directly on point to the facts of the instant case, U.S. v. Richards, 500 F. 2d 1025 (9th Cir. 1974), the Ninth Circuit found the use of a dog to detect the presence of contraband was permissible because the defendant had consented to a search of his personal effects. Although the officers had not secured a warrant, they were excused from that requirement by the defendant's express waiver of his Fourth Amendment rights.

In a recent Second Circuit decision, the Court decided that the use of a dog to sniff airline baggage was not a search. The decision is apparently grounded in the Court's view of an absence of an expectation of privacy as to airplane luggage, U.S. v. Bronstein, 521 F. 2d 459 (2nd Cir. 1975). In addition, the informant in Bronstein had been reliable in the past. In the instant case, a package was shipped on an airline -- a distinctly different expectation is therefore attached. (See Corngold and McGrew, supra.) Also, in the instant case, an informant of unproven reliability was used as the sole indication of criminal activity prior to the use of the dog. In the concurring opinion in Bronstein, at 464, Judge Mansfield finds that dog sniffing is a search.

> "There is no legally significant difference between

> the use of an X-ray machine or magnetometer to invade a closed area in order to detect the presence of a metal pistol or knife, which we have held to be a search, United States v. Albarado, 495 F. 2d 799, 802-803 (2nd Cir. 1974), and the use of a dog to sniff for marijuana inside a private bag. Each is a non-human means of detecting the contents of a closed area without physically entered into it. The magnetometer ascertains whether there is metal in the hidden space by detecting changes in the magnetic fields surrounding the area of the hidden space. The dog uses its extremely sensitive olfactory nerve to determine whether there are marijuana molecules emanating from the hidden space." Bronstein, supra, at 464.

However, Judge Mansfield concludes that the search is authorized implicitly because of the individual's declining expectation of privacy when he elects to place his baggage in public commerce. This logic is without authoritative support in the opinion and there is no proof offered that individuals surrender their justifiable expectations of privacy when they place their baggage in public transit.

The reasoning of Judge Pregerson follows the precedent laid down in Katz, supra, and strikes at the heart of the issue -- simply because a dog is flesh and blood, does that

make it any less a sophisticated device for searching than a listening device composed of wires, tubes and transistors. His conclusion is that regardless of the physical make-up of the device, its function is the significant question and when a dog ". . . whose sense of smell is said to be eight times more powerful than a man's . . ." Solis, (District Court), supra, is used as it was herein, a search most certainly has occurred.

Finally, and of consequence in this case, the Franklin County Court of Appeals, per McCormack, J., held that the sniffing of the air around the package by the dog constituted a search. See Opinion below, State v. Elkins, 47 Ohio App. 2d 307 (1976) (appended hereto).

C. If The Foot Locker Was Protected By The Fourth Amendment And If The Use Of The Dog Did Constitute A Search, Was The Search Reasonable?

In attempting to determine the appropriate relationship between the Fourth Amendment guarantees of the right to one's expectation of privacy and society's right to reasonably regulate that expection, the concurring opinion of Justice Harlan in Katz, supra, has become the definitive standard. His test is basically a two-fole one.

> "The person must exhibit an actual (subjective) expectation of privacy and the expectation must be one that society is prepared to recognize as reasonable." Katz, supra, at 361, (Harlan, J., concurring).

At one extreme, an individual has no expectation of privacy towards articles which he knowingly places in "plain view." Nor does the expectation of privacy survive a knowing and intelligent consent to search. Likewise, once a lawful arrest has been made, an individual surrenders his right to be free from searches and seizure of his person. And further, there exists clearly delimited exigent circumstances in which the police have the authority to conduct warrantless searches. These are generally limited to situations where, under the totality of the circumstances, there is an immediate necessity to conduct a search due to the likelihood of the destruction or disappearance of the objects of the search.

Conversely, at the other extreme is the Fourth Amendment in its most literal form; which guarantees citizens "the right . . . to be secure in their persons, homes, papers and effects . . . ." In the instant case, the Petitioner sought to transport a foot locker on a common carrier from California to Ohio. It was consigned to the carrier fully sealed and without notice to Petitioner, explicitly or implicitly, that such freight would be subjected to search. Petitioner was fully justified in expecting a high degree of privacy, absent some mishap which might result in the damage to the integrity of the container. Certainly society believes that those personal effects which they place in public transit will not be subjected to surveillance and penetration.

In those instances where the Courts have permitted some regulation of the transportation of personal effects these have been based upon a nexus of legitimate security concerns and some forewarning to individuals. The use of a magnetometer as a

device to screen passengers and their carry-on baggage at airline terminals has been held to be a reasonable search. See, United States v. Albarado, 495 F. 2d 799 (2nd Cir. 1974). There, the Court held there was an absolutely minimal invasion of privacy, an overwhelming threat to the hundreds of airplane passengers from an undetected hijacker and the forewarning of passengers that they would be subject to search. Id., at 806. See also, United States v. Bell, 464 F. 2d 667 (2nd Cir.) cert. denied 409 U.S. 991 (1972); United States v. Davis,482 F. 2d 893 (9th Cir. 1973).

Further, in a military case, United States v. Unrue, 22 USCMA 466 (1973) the Court identified a lessened expectation of privacy where individuals were on notice that they could be subjected to a search at a second checkpoint within the perimeter of an army base. The Court found the forewarning to be a crucial element to its assessment of reasonableness. Notwithstanding, Judge Duncan in dissent, Id., at 472, found this dimunition of Fourth Amendment was not based upon any factual demonstration of widespread drug abuse sufficient to justify warrantless searches.

In the instant case, there is no justification to permit the warrantless interception and search of Petitioner's locker while in transit from California to Ohio. Such a search was not reasonable nor necessitated by any direct showing that such warrantless penetration was mandated to protect persons or property from immediate harm or danger. As a result, any and all subsequent warrants, as well as evidence which was seized in reliance upon such search, are tainted and any evidence obtained must be suppressed. Silverthorn Lumber Company

v. United States, 251 U.S. 385 (1919); Wong Sun v. United States, 371 U.S. 471 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

II.

ASSUMING WITHOUT CONCEDING THAT THE PENETRATION OF THE EXTERIOR OF A SEALED FOOT LOCKER, WHERE THERE WAS AN EXPECTATION OF PRIVACY, BY A CANINE'S OLFACTORY SENSES DOES NOT CONSTITUTE A SEARCH, THERE WAS AN INSUFFICIENT SHOWING OF THOSE ELEMENTS OF THE CANINE'S RELIABILITY AND TRUSTWORTHINESS NECESSARY TO ALLOW A NEUTRAL AND DETACHED MAGISTRATE TO DETERMINE WHETHER PROBABLE CAUSE TO ISSUE A WARRANT TO SEARCH THE BOX DID EXIST. ABSENT SUCH PROBABLE CAUSE, ANY WARRANTS ISSUED IN RELIANCE THEREON OR EVIDENCE OBTAINED FROM SUBSEQUENT SEARCHES MUST BE SUPPRESSED.

On October 2[illegible]. 1975, the Honorable Frank A. Reda, Judge of the Franklin County Municipal Court, issued a search warrant pursuant to Ohio Rules of Criminal Procedure, Rule 41 (C) (See appendix). That rule requires the magistrate, prior to the issuance, to independently determine that probable cause exists for the search. If hearsay is employed as justification for probable cause the magistrate must be convinced that:

> "There is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished . . . ." Rule 41 (C), Ohio Rules of Criminal Procedure.

This rule is designed to afford citizens the full panoply of rights granted to them in the Fourth Amendment governing searches and seizures as applicable to the statutes through the Fourteenth Amendment. It codifies the standards enunciated by this Court in Aguilar, supra and Spinelli, supra.

The test established by Aguilar is two-fold: (1) how did the informant get his information, and (2) why should we believe this informant? The first goes to the circumstances underlying the acquisition of the information;the second considers the basis for the belief that the informant is credible or trustworthy. While these requirements are subject to the qualification of reasonableness and are not to be applied in a rigid and inflexible manner, U.S. v. Harris, supra, there still must be sufficient information presented to a magistrate to permit him to ascertain, independently, whether justification exists for the issuance of a warrant.

In the case before the Court, the Drug Enforcement Administration (hereinafter D.E.A.) was originally alerted by an anonymous phone caller, claiming that the Petitioner's foot locker, which had been shipped from California to Ohio, contained marijuana. The warrant itself fails to specify whether the call was made to the San Diego or Cleveland D.E.A. Office. The reliability of the informant is never established. The information forwarded is of the type that would be easily accessible to any one who viewed the package after it had been sealed. There is no support provided for the bald allegation that the package contained marijuana.

Unlike Solis, supra, the informant did not state that he had dealt with the Petitioner on numerous occasions in the past in

similar circumstances. Id., at 881. Nor was there evidence that the caller had viewed "a situation which appeared suspicious," United States v. Fulero, 498 F. 2d 748 (D.C. Cir. 1974),and there is no allegation that the package and its consignor exhibited any behavior which would have led the caller to believe that there was marijuana present. United States v. Bronstein, supra, at 460.

In the case of Spinelli v. United States, supra, the affiant swore that his confidant was reliable, but offered the magistrate no reason in support of this conclusion. While there was information alleging that Spinelli was known to the affiant and other law enforcement officers as a gambler and as an associate of gamblers, this was held to be "but a bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision." Nathanson v. United States, 290 U.S. 41, 46 (1933); Spinelli, supra, at 414.

Similarly, in the instant case, there are no reasons shown on the face of the warrant that would provide the magistrate with an opportunity to independently evaluate the reliability of the informant.

In addition, the statement by the affiant that:

> "Leon Elkins is known to the Columbus, Ohio Police Department as a trafficker in drugs, and has been arrested by the Columbus Police Department, disposition unknown at this time,"

is of the same tenor as the allegation in

Spinelli, above. The mere fact of arrest without conviction is protected by the fundamental presumption of innocence and indeed such must be afforded the Petitioner in this case. Cumulatively, the absence of information concerning the informant's prior reliability and the vague reputational evidence fall short of the standards necessary for probable cause, even allowing for a flexible, common sense approach, U.S. v. Harris, supra; U.S. v. Ventresca, 380 U.S. 102 (1965).

The Court below recognized that this bare information would not justify the issuance of a search warrant.

> "The prosecutor concedes that a warrant to search a package in Hopkins Airport in Cleveland could not have been obtained without the verification of marijuana within, as a result of the dog sniffing the parcel, as otherwise it is necessary to rely solely upon the credibility of the informant. Since the informant was anonymous, reliability could not be verified as required by Aguilar v. Texas (1964, 378 U.S. 108.)" Opinion below, supra, at 298.

As a result, the existence of probable cause to search hinges upon the additional indicia which are supplied by the detection dog. The pertinent aspects of the search warrant as regarding the dog involved are as follows:

> "The facts upon which such belief is based are as fol-

lows: an agent for the U.S. Customs Department and a dog handler who has used his dog, which has been used on several occasions to seek out marijuana, to verify the parcel contained marijuana. The dog indicated that marijuana was in the parcel."

Where probable cause has not been established, one federal court has assumed that a trained dog could be used to supply probable cause, but only if the Court was first provided with adequate information attesting to the dog's trustworthiness and reliability. United States v. Ponder, 45 C.M.R. 428, 433-434 (1972) petition for review by U.S.C.M.A. denied, 45 C.M.R. 928 (1972). The Court's assumption that dogs might be used to establish probable cause for a search warrant was based on the analogous use of tracking dogs and the cases allowing the admission of tracking dog evidence. Id., at 434, 46 A.L.R. 3rd 1221. Courts have insisted upon a showing of prior reliability by the dogs in order to assure that when an invasion of privacy is initiated, it will be undertaken only when the dog involved is sufficiently reliable to establish probable cause. Lederer and Lederer, Marijuana Dog Searches After United States v. Unrue, THE ARMY LAWYER, D.A. Pam 27-50-12, 6, 7 (Dec.1973).

Thus, to support a showing of probable cause to search, the same standards required by Aguilar and Spinelli govern: the magistrate must be informed of "underlying circumstances" which are the basis for the canine's determination "that narcotics were where he claimed they were," and the

underlying circumstances that are the basis for the officer's conclusion that the canine employed was a "credible" informant with "reliable" information. Aguilar v. Texas, supra, at 114.

The serious deficiency in the warrant at issue in this case is the complete lack of any showing to the magistrate of the reliability and credibility of the dog which was used in this action. In order to make an independent determination, the magistrate should be advised of the following: the exact training the detector dog has received; the standards or criteria employed in selecting dogs for marijuana detection training; the standards the dog was required to meet to successfully complete his training program; and the performance of the dog up until the search. United States v. Ponder, supra, at 435.

The rationale requiring such standards is due to the unique communication characteristics of detection dogs. A dog can alert to a drug in a variety of ways: the dog can snarl, bark, whine or paw at a container. United States v. Fulero, supra, at 749; United States v. Solis, 393 F. Supp. 325, 326 (C.D. Cal. 1975); People v. Furman, 30 Cal. App. 3rd 454, 455, 106 Cal. Rept. 366, 367 (1973). The alert is either "true" or "dead," depending upon whether the drug is actually at the spot the dog indicates or has only recently been there, and all that is left is a lingering odor caused by cigarette papers, pipes and other paraphernalia that have been in contact with narcotics. United States v. Unrue, supra, at 884-885.

Applying these standards to the facts of the case at bar, one need only examine the affidavit to conclude that the details provided are insufficient and fail to iden-

tify the training, experience, trustworthiness and accomplishments of the dog. The information is limited to that of an unidentified dog who "has been used on several occasions to seek out marijuana," and who has indicated "that marijuana was in the parcel." This conclusory statement is insufficient by itself without some basis for concluding either that the dog was reliable or that his information in this particular instance was credible.

> "It is particularly tempting to credit a dog with great powers for no reason other than that marijuana was found exactly where the dog indicated it would be, even though no prior reliability is shown . . . . The legality of a search may not be based on evidence discovered as a result thereof. United States v. Bowser, 33 C.M.R. 703 (AFBR 1963)," United States v. Ponder, supra, at 335 n. 6.

The failure on the part of the magistrate to secure the above safeguards rendered the subsequent search and all evidence secured as a result thereof tainted, and therefore, under the authority of "the fruit of the poisonous tree" doctrine, must be suppressed. Silverthorn Lumber Company v. United States, 251 U.S. 385 (1919); Wong Sun v. United States, 371 U.S. 471 (1963).

CONCLUSION

For the foregoing reasons, Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the Court below.

Dated: February 6, 1977

Respectfully submitted,

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*Counsel for Petitioner wishes to express his gratitude to Jerome E. Friedman for his invaluable assistance in the preparation of this petition.

APPENDIX I

AMENDMENT FOUR, CONSTITUTION OF THE UNITED STATES

THE RIGHT OF THE PEOPLE TO BE SECURE IN THEIR PERSONS, HOUSES, PAPERS, AND EFFECTS, AGAINST UNREASONABLE SEARCHES AND SEIZURES, SHALL NOT BE VIOLATED, AND NO WARRANTS SHALL ISSUE BUT UPON PROBABLE CAUSE, SUPPORTED BY OATH OR AFFIRMATION, AND PARTICULARLY DESCRIBING THE PLACE TO BE SEARCHED, AND THE PERSON OR THINGS TO BE SEIZED.

AMENDMENT FOURTEEN, CONSTITUTION OF THE UNITED STATES

SECTION 1. ALL PERSONS BORN OR NATURALIZED IN THE UNITED STATES AND SUBJECT TO THE JURISDICTION THEREOF, ARE CITIZENS OF THE UNITED STATES AND OF THE STATE WHEREIN THEY RESIDE. NO STATE SHALL MAKE OR ENFORCE ANY LAW WHICH SHALL ABRIDGE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES, NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY OR PROPERTY, WITHOUT DUE PROCESS OF LAW: NOR DENY ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS.

OHIO RULES OF CRIMINAL PROCEDURE

RULE 41. Search and Seizure.

(C) Issuance and contents. A warrant shall issue under this rule only on an affidavit or affidavits sworn to before a judge of a court of record and establishing the grounds for issuing the warrant. The affidavit shall name or describe the person to be searched or particularly describe the place to be searched, name or describe the property to be searched for and seized, state substantially the offense in relation thereto, and state the factual basis for the affiant's belief that such property is there located. If the judge is satisfied that probable cause for the search exists, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished. Before ruling on a request for a warrant, the judge may require the affiant to appear personally, and may examine under oath the affiant and any witnesses he may produce. Such testimony shall be admissible at a hearing on a motion to suppress if taken down by a court reporter or recording equipment, transcribed and made part of the affidavit. The warrant shall be directed to a law enforcement officer. It shall command the officer to search, within three days, the person or place named for the property specified. The warrant shall be served in the daytime, unless the issuing court, by appropriate provision in the warrant, and for reasonable

cause shown, authorizes its execution at times other than daytime. The warrant shall designate a judge to whom it shall be returned.

APPENDIX II

IN THE COURT OF APPEALS,
FRANKLIN COUNTY, OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs. Case No. 75AP-511

LEON ROBERT ELKINS,

Defendant-Appellant.

D E C I S I O N

Rendered on February 12, 1976

MR. GEORGE C. SMITH, Prosecuting Attorney
MR. ALAN C. TRAVIS, Assistant
Franklin County Hall of Justice,
Columbus, Ohio,
For Plaintiff-Appellee.

CAMPBELL, SCHWARZWALDER & SANFORD,
MR. A. MICHAEL SCHWARZWALDER,
40 West Gay Street
Columbus, Ohio,
For Defendant-Appellant.

Appellant has timely appealed his conviction of possession for sale of marijuana and keeping a house for the illegal keeping or dispensing of marijuana. Both parties concede that the sole issue is whether marijuana discovered by the use of a trained dog was illegally obtained.

The facts pertaining to this issue are that a federal agent received an anonymous phone call stating that a parcel had been mailed from San Diego, California to Cleveland, Ohio, via American Airlines parcel delivery. The package was precisely described, even to shipping bill number. Upon the plane's arrival in Cleveland, Ohio, a federal agent verified the fact that the package was aboard the plane and summoned a dog handler to bring his trained dog, used on various occasions to seek out marijuana, to sniff the parcel. Using his trained and superior olfactory powers, the trained dog indicated that marijuana was in the parcel. The federal authorities then obtained a search warrant and discovered twenty-one kilos of marijuana in the box.

Subsequent search warrants, not in issue herein, which were the by-product of the original search, showed Appellant to be guilty of the offenses for which he was convicted in relation to the marijuana found by the dog in the parcel. The prosecution concedes that the validity of their entire case rests upon whether the use of the police dog was permissible.

Appellant filed a timely motion to suppress in the trial court which was overruled. Appellant's assignment of error is

as follows:

> "Where police officers, acting solely on a tip from an informant of unproven reliability, use a dog to sniff the exterior of a sealed box which is in transit on a common carrier, such use of a dog constitutes a search within the meaning of the Fourth Amendment without probable cause and any search warrants obtained based upon evidence discovered as a result of such search are tainted and any evidence obtained must be suppressed."

The Fourth Amendment to the United States Constitution provides, as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The prosecutor concedes that a warrant to search the package at Hopkins Airport in Cleveland could not have been obtained without the verification of marijuana within as a result of the dog sniffing the parcel, as otherwise it is necessary to rely solely upon the credibility of the informant. Since the informant was anonymous, reliability could not be verified as required by Aguilar v. Texas (1964), 378 U.S. 108.

The issues are whether the smelling by the dog constituted a search since there was no physical intrusion of the wrapped package and, if so, whether the search was unreasonable under these facts. Prior to 1967, the United States Supreme Court had taken the position that a physical intrusion of an enclosure must occur before there can be an illegal search. However, that theory was repudiated by the decision of Katz v. U.S. (1967), 389 U.S. 347. Katz involved the use of an electronic listening device attached to the outside of a telephone booth through which federal agents recorded the defendant's telephone conversation. The recording and the fruits therefrom were found to be inadmissible in violation of the Fourth Amendment on the basis that Katz expected his conversation to be private and that the listening device was an unreasonable search in violation of his privacy. Appellant seeks to extend that doctrine to this case, contending that the specially trained dog, with its keen olfactory powers, discovering marijuana in the enclosed box, was equivalent to using electronic monitoring equipment to hear sound from the telephone booth.

Two cases involving this very issue have been decided by federal courts, with inconsistent results. The first case is that of U.S. v. Fulero (1974), 498 F. 2d 748. The facts in that case were that an employee at the Greyhound Bus Depot in Yuma, Arizona, called the police and told them that three hippies had brought in two footlockers that were being sent to Washington, D.C., and that the situation appeared suspicious. Shipping marijuana through Greyhound was a normal practice in Yuma and, on many prior occasions, agents of the depot had spotted packages containing marijuana. A police

officer went to the depot and looked at the footlockers. The name of a man known to the police as probably involved in the narcotics traffic was on one of the lockers. In addition, the police noticed that the footlockers smelled of mothballs, which was significant because mothballs are frequently used in an attempt to conceal the odor of marijuana. At that point, the police obtained the services of a marijuana sniffing dog and the dog indicated that the footlockers contained marijuana. When a search warrant was obtained based on this information, the trunks were found to contain approximately eighty-eight pounds of marijuana. The United States Court of Appeals for the District of Columbia rejected the argument that the dog's sniffing around the footlockers was an unconstitutional invasion into the lockers, calling it frivolous and praising the conduct of the police as a model of intelligent and responsible procedure.

The second case involving this issue is that of U.S. v. Solis (1975), 393 F. Supp. 325. In that case an informant of unproven reliability had notified the police that a fully enclosed semitrailer, parked at the rear of a service station, contained large sums of marijuana. The police used two trained dogs to sniff the air around the trailer. The dogs positively reacted as to the presence of marijuana, after which a search warrant was obtained. The dog handlers testified that their trained dogs, whose sense of smell is eight times more powerful than that of man, are 100% reliable in detecting kinds of narcotics, including marijuana. The search warrant obtained based on this evidence produced two thousand pounds of marijuana which had been secreted under the floorboards of the trailer.

The United States District Court held that the use of the dogs constituted an unreasonable search and seizure, prohibited by the Fourth Amendment to the U.S. Constitution. The Court,in so deciding, concluded this case was analogous with Katz as, in each instance, the government's activities violated the privacy which defendant justifiably and reasonably expected.

Neither of the aforesaid cases are binding upon this Court and the case is apparently one of first impression in Ohio. This Court must determine, based on applicable decisions of the United States Supreme Court, whether the use of a marijuana sniffing dog under the facts herein constitutes an unreasonable search and seizure prohibited by the Fourth Amendment to the United States Constitution.

As previously stated, the first issue is whether the sniffing of the air around the package by the dog constituted a search. That question must be answered in the affirmative. By the use of a sophisticated device, albeit flesh and blood, the user perceived something entirely hidden from human senses, enhanced or unenhanced. As conceded in the Solis case by the government, no real distinction can be drawn between the use of specially trained dogs with superior olfactory powers than use of an electronic instrument which registers a smell which a human cannot perceive. In this respect the case is comparable to that of Katz where the electronic device attached to the outside of the enclosed telephone booth constituted a search even though there was no physical intrusion of the enclosure.

Not all searches are prohibited by the Fourth Amendment, but only those which

are unreasonable. The Katz case properly held that a person making a private call in an enclosed phone booth had a reasonable expectation, worthy of protection, that his conversation not be overheard by the use of electronic sound enhancers. The question is whether the situation at hand constitutes a comparable situation so far as the unreasonableness of intrusion is concerned. The Solis case did hold it to be comparable and the Fulero case, without discussion, simply rejected the claim as frivolous.

It is the firm view of this Court that the use of the dog to indicate the presence of marijuana did not constitute an unreasonable search either in this case or in the Solis case which, in our view, was incorrectly decided. Here, as in the Solis case, we have an enclosed object, innocent on its fact, located in a public place. In each instance there is reasonable suspicion of the presence of an illicit drug within the package, but not so verified as to be able to obtain a search warrant. Counsel for appellant concedes that any reasonable police agency would follow up the anonymous, although specific, tip to determine if in fact an illicit drug were contained therein. The dispute concerns the appropriate method of follow-up police work. Obviously, merely searching the package or breaking into the trailer is prohibited in either instance. Conceivably, had the trained police dog not been available, the police could have staked out the area, or followed the package in transit, utilizing perhaps hundreds of hours of police work in an effort to obtain further evidence necessary to sustain the issuance of a search or arrest warrant. Instead, the police, who fortunately have also developed more

sophisticated techniques to deal with criminals in response to a similar development on the part of criminals, utilized the trained police dog to obtain the further evidence necessary for procurement of a search warrant.

The court in the Solis case stated that the owner of the trailer had a reasonable expectation that no one would intrude into the privacy of his trailer, other than upon probable cause supported by a search warrant. Yet, what type of an intrusion did take place in both this case and the Solis case? The intrusion consisted of sniffing the air around the enclosed trailer or package. No further intrusion took place without the proper issuance of a search warrant. This case and the Solis case, although apparently at first blush analogous to the Katz situation, are actually a far cry therefrom. In the Katz case a person's right of privacy is offended whether that person is innocent or engaged in conversation involving a criminal act. Persons do not want even innocent private conversations monitored without probable cause. Innocent persons are offended by that intrusion and, hence, the search is unreasonable. In this instance, it is hard to imagine that an innocent person could have any objection to his package, placed in transit on a common carrier, being sniffed by a trained dog. The Court, in the Solis case was correct in saying that "whether a governmental intrusion into a private area constitutes a reasonable search under the Fourth Amendment depends on the kind and degree of intrusion which a free society is willing to tolerate." However, the Court was incorrect in its application of that test to the facts in hand. In so holding the Court made an all too common mistake

of using logic without common sense. Moreover, the Court appeared to be affected by the skillful use of hypothetical horror stories often used to influence a Court's holding. These horror stories rarely, if ever, even closely resemble the facts of the case. They include allegations that a holding such as we have made in this case would permit the police to roam the streets at will with trained dogs or sensor instruments, detecting the odor of marijuana and arresting persons at will as a result. No such conduct was involved in this case or in the Solis case, nor is such conduct, theoretical as it may be, to be condoned. We are fully confident that this Court and other courts are able to deal with the constitutional rights involved if such a situation is ever presented to us. In this case as in others, courts must resist the tendency to decide the case before them based on what might happen.

Under the facts of this case, the use of the dog trained to detect marijuana was reasonable and not violative of the Fourth Amendment. Furthermore, it represented police work which should be commended rather than condemned.

The judgment of the trial court is affirmed.

STRAUSBAUGH, P.J., and REILLY, J., concur.

APPENDIX III

THE SUPREME COURT OF OHIO

1976 Term

THE STATE OF OHIO,

City of Columbus, To wit: September 10, 1976

State of Ohio,
Appellee, No. 76-460

vs. APPEAL FROM THE COURT OF APPEALS

Leon Robert Elkins,
Appellant. for Franklin County

This cause, here on appeal as of right from the Court of Appeals for FRANKLIN County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for FRANKLIN County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of this Court this 10th day of September, 1976.

/s/ Thomas L. Startzman